

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
DAVID HALL, et al.	:	NO. 06-002-01/02

MEMORANDUM

Bartle, C.J.

July 25, 2006

Before the court is the motion of defendant Ronald Austin ("Austin") for relief from prejudicial joinder pursuant to Rule 14(a) of the Federal Rules of Criminal Procedure. Co-defendant David Hall ("Hall") has joined in the motion.

Defendants Hall and Austin, and defendant Syreeta Womack ("Womack") are charged in a second superseding indictment with violations of federal firearms and drug laws. Specifically, Hall is charged with conspiracy to possess with intent to distribute cocaine, possession with intent to distribute cocaine, and possession with intent to distribute cocaine near a school. 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(B), 860(a) and 18 U.S.C. § 2. Austin is alleged to have violated federal laws prohibiting conspiracy to possess with intent to distribute cocaine, possession with intent to distribute cocaine, possession with intent to distribute cocaine near a school, possession of a firearm in furtherance of a drug trafficking crime, and possession of a firearm by a felon. 21 U.S.C. §§ 846, 841(a)(1),

(b)(1)(B), 860(a) and 18 U.S.C. §§ 924(c)(1), 922(g)(1), and 2. Womack is charged with possession with intent to distribute cocaine near a school and possession of a firearm in furtherance of a drug trafficking crime. 21 U.S.C. § 860(a) and 18 U.S.C. §§ 924(c)(1) and 2.

According to the Government's evidence at a hearing on a motion to suppress evidence, two Philadelphia Police officers observed Austin at the rear of a silver 2-door Chevrolet Monte Carlo parked on the east side of 7th Street. One of the officers saw Austin place on the ground a brick-shaped package wrapped in duct tape. From his experience, he believed it to contain cocaine. The police officers exited their vehicle and noticed in plain view in the parked vehicle a handgun and what they believed to be two additional kilogram bricks of cocaine wrapped in duct tape.

Hall was allegedly a passenger in the parked vehicle, although he disclaimed ownership of the cocaine. He was placed under arrest and the driver, Womack, was instructed to turn off the vehicle's engine. She was placed under arrest shortly thereafter.

Austin and Hall seek severance of their trials from Womack's so that she may testify as a witness on their behalf while retaining her Fifth Amendment right not to testify at her trial. In a declaration, Womack has stated that "It is likely that I will not testify in my own defense. Instead, I expect to rely on my right not to testify. If Ronald Austin were to have a

trial separate and subsequent to my trial, I would testify as a defense witness in his case." She would testify that "at no time did Mr. Austin ever have possession of the firearm at issue and at no time did the firearm ever leave the glove compartment of the Monte Carlo until after I informed the Philadelphia Police of its presence." There will apparently be evidence that the handgun was registered to her.

At her proffer interview with the Assistant United States Attorney and the Philadelphia District Attorney, Womack stated that Hall was never in her vehicle on the day of their arrest. Hall seeks severance of his trial from Womack's so he may elicit this testimony from her.

Rule 14(a) of the Federal Rules of Criminal Procedure provides that "If the joinder of ... defendants in an indictment ... appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." The Supreme Court has advised that "there is a preference in the federal system for joint trials of defendants who are indicted together" because "they promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" Zafiro v. United States, 506 U.S. 534, 537 (1993). The Court has emphasized that "defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." Id. at 540. Rather, there must be "a serious risk that a joint trial would compromise

a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Id. at 539.

In determining whether severance is warranted when a defendant alleges that a co-defendant will provide exculpatory testimony, "courts have placed emphasis on the following four factors: (1) the likelihood of co-defendant's testifying; (2) the degree to which such testimony would be exculpatory; (3) the degree to which the testifying co-defendant[] could be impeached; [and] (4) judicial economy." United States v. Boscia, 573 F.2d 827, 832 (3d Cir. 1978).

We first turn to the motion for severance as it relates to Austin. As noted above, in her declaration, Womack has conditioned her agreement to testify at Austin's trial on her being tried first so as not to waive her Fifth Amendment right not to testify at her own trial. Numerous courts have found that a co-defendant's promise to testify which is conditioned on a particular ordering of trials does not establish the requisite likelihood of the co-defendant's testimony and amounts to an improper attempt by defendants to control the order in which they are tried. United States v. Broussard, 80 F.3d 1025, 1038 (5th Cir. 1996); United States v. Ford, 870 F.2d 729, 731-32 (D.C. Cir. 1989); United States v. Blanco, 844 F.2d 344, 353 (6th Cir. 1988). Thus, the first factor weighs against severance.

The exculpatory nature of Womack's testimony is also questionable. Her statement that Austin was never in possession

of the handgun and that it remained at all times in the glove compartment does not preclude Austin's conviction on the charge of possessing a firearm in furtherance of a drug trafficking crime. 18 U.S.C. 924(c). A jury may find that Austin was in proximity of the handgun, and exercised such control over the place where the firearm was located that he was in constructive possession of the handgun sufficient to satisfy § 924(c). See United States v. Williams, 344 F.3d 365, 379 (3d Cir. 2003).

We also note that Womack's testimony is subject to impeachment. Womack and Austin, although separated, have been married through the Muslim religion, and she is the mother of their children. She will undoubtedly be impeached as biased because of these relationships. Moreover, she has been charged with aiding and abetting Austin in his possession of a firearm in furtherance of a drug trafficking crime. Any testimony exculpating Austin also serves to exonerate her and may be subject to attack as self-serving. United States v. Novation, 271 F.3d 968, 990 (11th Cir. 2001).

Finally, judicial economy favors a single trial. In sum, consideration of the relevant factors does not weigh in favor of severing the trials of Austin and Womack.

We now turn to that portion of the severance motion pertaining to Hall. Hall seeks to call Womack at his trial to elicit her proffer testimony that he had never entered her vehicle. Nowhere in the record has Womack indicated her willingness to testify on Hall's behalf, and a defendant may not

compel a co-defendant to testify on his behalf, even where the trials are severed. United States v. Provenzano, 688 F.2d 194, 198 (3d Cir. 1982). Moreover, the exculpatory nature of Womack's testimony is diminished by the fact that it would be cumulative. United States v. Wilson, 11 F.3d 346, 354 (2d Cir. 1993); United States v. Finkelstein, 526 F.2d 517, 524 (2d Cir. 1975). During argument on this severance motion, Hall's counsel stated on the record that at least five witnesses are prepared to testify that Hall was never present in Womack's vehicle. Lastly, as stated above, judicial economy favors a single trial. The four factors in Boscia weigh against a severance of Womack's trial and Hall's trial.

Accordingly, the motion of defendant Ronald Austin for relief from prejudicial joinder, in which defendant David Hall has joined, will be denied.

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ORDER

AND NOW, this 25th day of July, 2006, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of defendant Ronald Austin for relief from prejudicial joinder, in which defendant David Hall has joined, is DENIED.

BY THE COURT:

Harvey Bartle III

C.J.